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No. 91-668

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

REGINA MEKSS,

Petitioner,

v.

WYOMING GIRLS' SCHOOL, STATE OF WYOMING,
Respondent.

Petition For Writ Of Certiorari To The
Supreme Court Of Wyoming

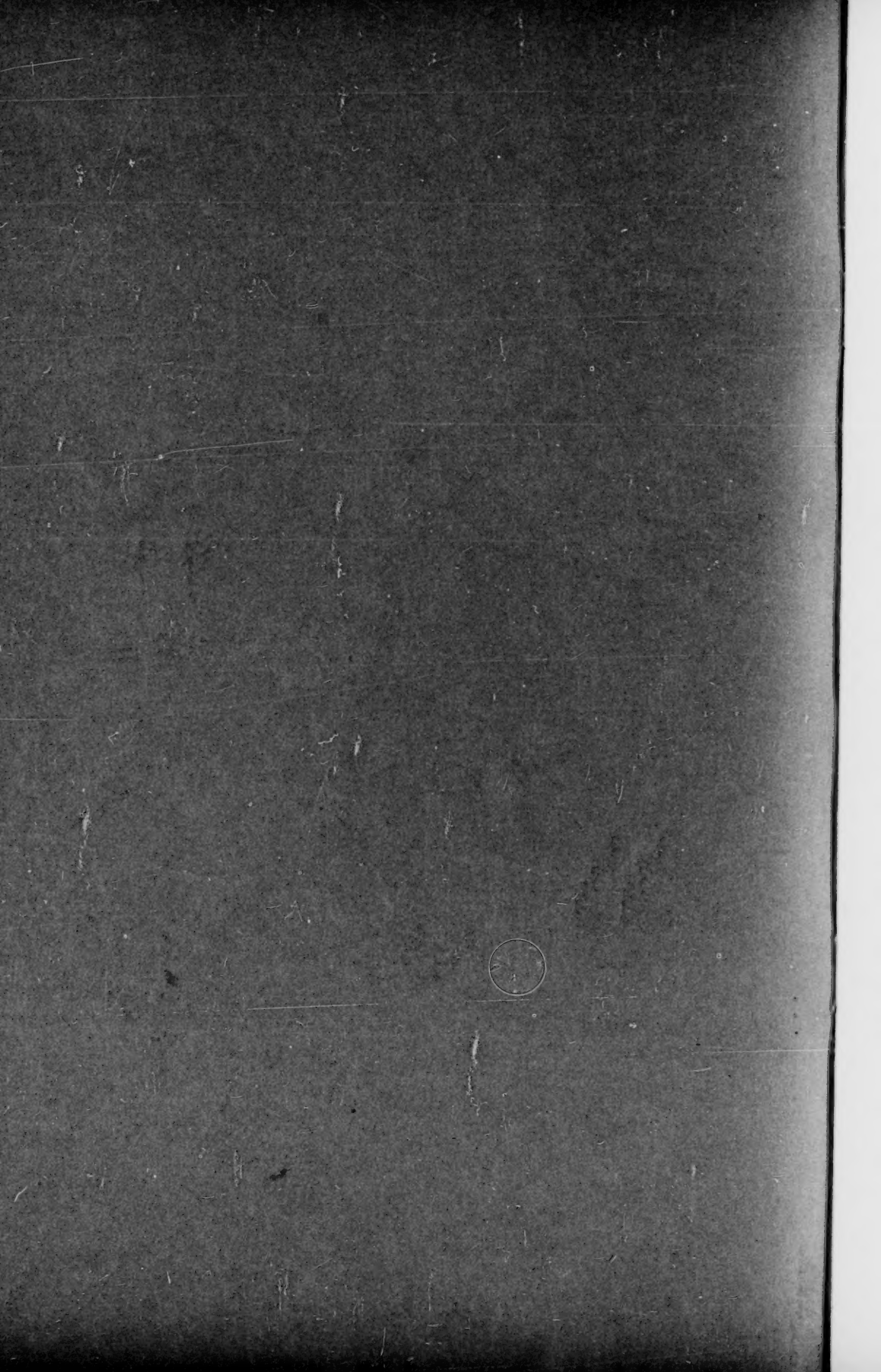
BRIEF OF WYOMING GIRLS' SCHOOL,
STATE OF WYOMING IN OPPOSITION

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QUESTION PRESENTED

Whether the court below applied the appropriate standard of review in holding that Respondent did not violate Petitioner's first amendment rights by terminating her state employment.

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STATEMENT OF THE CASE

Respondent, Wyoming Girls' School ("Girls' School"), terminated Petitioner's employment for two reasons:

1. Circumventing established lines of authority; and
2. Refusing to accept disciplinary measures imposed.

In March of 1988, Girls' School Superintendent Jack Geisler ("Geisler"), aware that a group of Girls' School employees were unhappy with the administration of the school, held an off-campus meeting with the employees about their concerns, and then issued a memo to all employees inviting them to come forward and discuss any concerns with him or his assistant. The discontent continued into the summer of 1988, developing to the point that two employees in June 1988 sent an anonymous letter to K. Gary Sherman ("Sherman"), Executive Secretary of the Board of Charities and Reform ("Board"), the state board which supervised the operations of the Girls' School.¹ Sherman requested Geisler's response to this letter and later exonerated management of any wrongdoing.

The Board subsequently received additional anonymous letters, including one dated August 12, 1988. That letter expressed concerns about morale, discriminatory

¹ In 1988, the Board supervised all Wyoming charitable, correctional, and reformatory institutions. Following state government reorganization, the Girls' School is organizationally within a new Department of Family Services.

practices, mismanagement and the use of corporal punishment against Girls' School residents. The letter also made vicious personal attacks on Geisler, complaints about staff relations, and outright false or fabricated allegations.²

In response to the second batch of anonymous letters, the Board conducted an impartial investigation. The state corrections administrator and the warden of the state's female prison were assigned to investigate the Girls' School and the anonymous allegations. The investigators, neither of whom were affiliated with the Girls' School, interviewed every Girls' School employee over a two-day period. The results of the investigation again completely exonerated management of the alleged malfeasance. In addition, Sherman concluded, based on the investigative report, that "the allegations were spurious, mean spirited and without substance."

On September 9, 1988, Geisler once again spoke to the entire staff. He emphasized that the School's mission requires honesty, harmony, trust, and mutual respect among staff members. He invited everyone present to freely discuss any concerns with him, emphasizing the proper chain-of-command in addressing problems concerning the function of the Girls' School.

Not satisfied with the results of the investigation, and despite Geisler's recent directives, Petitioner attempted to directly contact Sherman on November 23,

² For example, the letter alleged that 60% of the staff supported the writer's position, an allegation which was later shown to be untrue and speculative on the writer's part.

1988. Sherman had the state corrections administrator return Petitioner's call, but Petitioner refused to speak with him about her concerns.

On November 30, 1988, Petitioner met with her supervisors, including Geisler, to discuss her conversation with the corrections administrator. Petitioner falsely stated that her attempt to contact Sherman did not relate to the Girls' School. Geisler elected not to pursue the matter, but again directed Petitioner to discuss with him any problems she may have with him, or any other of her supervisors, before taking other action.

After the meeting, Petitioner once again contacted Sherman to discuss her dissatisfaction with the investigation. Sherman informed Petitioner at the very outset of the conversation that she was in "risk" of violating the chain-of-command.³ It was during this phone call that Petitioner admitted she wrote the August 12, 1988 anonymous letter.

Geisler, being advised of Petitioner's call to Sherman, approached Petitioner and presented her with three options:

1. She would resign;
2. She would accept a temporary suspension and write an apology letter to those who had been affected by her false allegations; or
3. She would be dismissed.

³ Petitioner testified that the warning came much later in the conversation.

Petitioner pursued the second option and drafted an "apology" in which she primarily repeated previous allegations. Geisler did not accept her apology letter because of its mere reiteration of her proven baseless accusations. She was subsequently terminated, effective December 21, 1988.

Petitioner requested a post-termination hearing pursuant to the State of Wyoming Personnel Rules. The Personnel Review Board upheld the dismissal on May 15, 1989. Pursuant to the Wyoming Administrative Procedure Act, Wyo. Stat. 16-3-101 *et seq.*, Petitioner appealed the review board decision to the District Court of Sheridan County, which affirmed the administrative decision. Appeal to the Wyoming Supreme Court followed. That court issued its decision affirming the dismissal on June 12, 1991.

SUMMARY OF ARGUMENT

The United States Supreme Court has announced the proper constitutional analysis in those cases where a state employee challenges disciplinary action on the grounds that the action is in retaliation for the employee's exercise of free speech rights. The Wyoming Supreme Court acknowledged that analysis and correctly applied it in this case.

The state court first identified two instances of expression by Petitioner where her first amendment rights were arguably infringed. In regard to both instances, the court gave the benefit of any doubt to Petitioner and assumed that her free speech rights were

sufficiently involved to merit heightened analysis under *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

As to the first instance of expression, an anonymous letter which Petitioner later admitted writing, the court correctly concluded there was no causal nexus between the expression and the disciplinary action.

As to the second instance of expression, a telephone call to a state official, the court first considered whether Petitioner was acting as a "whistle-blower." The court concluded she was not, as she was motivated by personal reasons and she had no personal knowledge of the matters which she complained about. The court then correctly concluded that the employer's interest in maintaining efficiency, morale and *esprit de corps* outweighed Petitioner's interest in repeatedly voicing her dissatisfactions outside the proper chain-of-command.

ARGUMENT

NO GROUNDS EXIST FOR GRANTING CERTIORARI

- A. The Wyoming Supreme Court properly applied the court's analysis in *Pickering*, and its progeny, in determining that Petitioner's first amendment rights were not violated.

In its opinion, the Wyoming Supreme Court properly applied this court's four-part constitutional test to Petitioner's first amendment argument. The Wyoming Supreme Court was correct, both in its statement of controlling law and its application.

The court below began its analysis by citing *Schalk v. Gallemore*, 906 F.2d 491, 494-95 (10th Cir. 1990), which sets forth the test applicable to a public employee's right of free speech:

First, the court must decide whether the speech at issue touches on a matter of public concern. *Connick*, 461 U.S. at 146, 103 S.Ct. at 1689; *Melton [v. City of Oklahoma City]*, 879 F.2d [706] at 713 [(10th Cir. 1989)]. If it does, the court must balance the interest of the employee in making the statement against the employer's interest "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1735, 20 L.Ed.2d 811 (1968). Third, if the preceding prerequisites are met, the speech is protected, and plaintiff must show her expression was a motivating factor in the detrimental employment decision. *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). Finally, if the plaintiff sustains this burden, the employer can still prevail if it shows by a preponderance of the evidence that it would have made the same decision regardless of the protected speech.

(Petitioner's Brief, p. 18a).

Before applying the sequential test, the Wyoming Supreme Court identified two separate instances of speech by Petitioner:

- 1.. The August 12, 1988, anonymous letter written to the Board; and,
2. The November, 1988, telephone call to Sherman.

(Petitioner's Brief, p. 19a).

The Girls' School terminated Petitioner's employment, not for the anonymous letter, but for her later defiance and insubordination in contacting Sherman. The court below correctly concluded "that the anonymous letter should be afforded the highest level of constitutional protection in accordance with the applicable principles of law." (Petitioner's Brief, p. 20a). Though Petitioner argues that her termination was due, in part, to her authorship of the letter, she fails to point to any factual basis for such a position. The court correctly applied the four-part test to the anonymous letter, holding that Petitioner failed to prove, under part three of the test, that the anonymous letter was a motivating factor in her dismissal. (Petitioner's Brief, p. 22a). The Wyoming Supreme Court, therefore, proceeded to apply proper constitutional analysis to the other instance of expression, the telephone call to Sherman.

Before applying the four-part *Pickering* test, the Wyoming Supreme Court first grappled with whether Petitioner's phone call to Sherman deserved "whistle-blower" status. The court doubted that Petitioner's communication touched upon matters of public concern. (Petitioner's Brief, p. 24a).⁴ There was no evidence that the investigation was flawed, and Petitioner had no personal knowledge of any wrongdoing. See *Hughes v. Whitmer*, 714 F.2d 1407, 1423 (8th Cir. 1983), cert. denied sub nom, *Hughes v. Hoffman*, 465 U.S. 1023, 104 S.Ct. 1275,

⁴ "[The] telephone calls to Sherman did not acquire automatic 'whistle blower' protection and, in that light, we apply the sequential test summarized in *Schalk*, 906 F.2d 491."

79 L.Ed.2d 680 (1984). Communications regarding grievances of a personal nature are unprotected. *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). The court pointed out that Petitioner's communication may have been motivated by her personal displeasure, a purely private interest. (Petitioner's Brief, p. 27a). The court therefore declined to recognize whistleblower status. However, the court again gave the benefit of the doubt to Petitioner in regard to the phone call as it did the anonymous letter and assumed, without deciding, that Petitioner's call to Sherman involved a matter of public concern. (Petitioner's Brief, p. 27a).

Proceeding to the second step of the first amendment test, the court discussed at length whether Petitioner's interest in voicing to Sherman her criticism of the completed investigation outweighed the Girls' School's valid and important interest in maintaining discipline and *esprit de corps*. (Petitioner's Brief, p. 28a-31a). "The School's interest in maintaining good working relationships within the staff and a stable public image weighs more heavily in the light of *Pickering* than Mekss' interest in repeatedly attempting to tell Sherman her views about the results of the investigation." (Petitioner's Brief, p. 30a). The lower court was unquestionably correct in its first amendment analysis.

It is clear that public employers have a legitimate concern with the efficient operations of their offices, agencies or institutions; review of every personnel decision made by a public employer hampers the performance of public functions. *Rankin v. McPherson*, 483 U.S.

378, 384, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315 (1987). Other considerations include:

[W]hether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

Id. at 388. And, baseless and unfounded allegations are equally important factors. *McMurphy v. City of Flushing*, 802 F.2d 191, 195 (6th Cir. 1986); *Fiorillo v. U.S. Dept. of Justice, Bureau of Prisons*, 795 F.2d 1544, 1551 (Fed. Cir. 1986).

Furthermore, it is not necessary for an employer to "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action," *Connick*, 461 U.S. at 152; *Hughes*, 714 F.2d at 1407, 1421 (C.A. 8, 1983).

The Wyoming Supreme Court concluded, upon an abundance of evidence in the record, that

[Petitioner's] telephone calls to Sherman directly impaired Geisler's authority and ability to discipline the staff. When Mekss told Geisler that her first call to Sherman had nothing to do with the School, and then promptly called Sherman again to complain about the investigation, there was deception that was deliberate, if not an intentional untruth. Those calls did have a direct and detrimental impact on Geisler's confidence in Mekss' loyalty to the School and to him. . . . A limited First Amendment interest involved in connection with the telephone calls

to Sherman does not require that the School tolerate this action which reasonably could be expected to disrupt operations, undermine authority, and destroy close working relationships.

(Petitioner's Brief, pp. 30a and 31a).

Petitioner's argument primarily centers around her belief that the Girls' School punished her for bypassing the chain-of-command. She cites lower court cases wherein government employees were disciplined or terminated for violating a chain-of-command rule primarily in the first instance. Petitioner overlooks the fact that she was not subject to discipline for her anonymous letter to the Board. It was only after her allegations were objectively determined to be baseless and false and after lying to her supervisor that disciplinary action, i.e., suspension, was imposed. Then she refused to accept that discipline and repeated her personal attack on her supervisors, which led to her termination. Clearly, insubordinate behavior such as engaged in by Petitioner is a legal, nondiscriminatory justification for imposing employee discipline, including termination.

Petitioner also argues that because she served in a nonpolicymaking position, any disharmony or loyalty concerns caused by her actions were irrelevant. That position is unreasonable. As four dissenting Justices of this Court stated in *Rankin*, "Nonpolicymaking employees (The Assistant District Attorney in *Connick*, for example) can hurt working relationships and undermine public confidence in an organization every bit as much as policy making employees." *Rankin*, 483 U.S. at 400, 401 (Rehnquist, C.J., O'Connor, J., Scalia, J., White, J., dissenting).

Petitioner was engaged in a months-long campaign against the administration of the Girls' School, especially its superintendent, conducted through a series of anonymous lies and insubordinate jumping of the chain-of-command. An employer should not have to wait for such a campaign to succeed before taking appropriate action.

CONCLUSION

Petitioner fails to show that the Wyoming Supreme Court erred in its constitutional analysis. Obviously, and understandably, Petitioner disagrees with the application of first amendment analysis to the facts as found by the Personnel Review Board. Disagreement with the facts, however, does not create a constitutional issue worthy of review by the Supreme Court of the United States, where the Wyoming Supreme Court properly applied first amendment review.

For the reasons stated, Respondent requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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